IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

KEMPER EHRHARDT AND ROBERT EHRHARDT, — APPELLANTS

CASE NO. 2016-TS-00277

HELEN DONELSON AND
GARY T. HUFFMAN, CO-EXECUTORS
OF THE ESTATE OF JULIA DONELSON
EHRHARDT — APPELLEES

APPEAL FROM THE CHANCERY COURT
OF WARREN COUNTY, MISSISSIPPI

BRIEF OF APPELLANTS KEMPER EHRHARDT AND ROBERT EHRHARDT

****Oral Argument Requested****

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or entities have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. S. Craig Panter, attorney for Appellants.
2. Appellant, Kemper Ehrhardt.
3. Appellant, Robert Ehrhardt.
4. Appellee, Helen Donelson.
5. Appellee, Gary T. Huffman.
6. Kenneth B. Rector, Attorney for Appellees.
7. Estate of Julia Donelson Ehrhardt.

/s/ S. Craig Panter
S. Craig Panter, attorney Appellants

TABLE OF CONTENTS

Table of Contents……..3

Table of Cases, Statutes and Other Authorities……....4

Statement of Issue Presented on Appeal……..6

A. Nature of the Case……....7

B. Course of Proceedings……..7

C. Disposition in the Lower Court…….8

D. Statement of the Facts…….. 9

Summary of the Argument……... 12

Argument…… 14

A. Standard of Review…….. 14

B. Issues Presented on Appeal…….. 14

Conclusion……..26

TABLE OF CASES, STATUTES AND OTHER AUTHORITIE

Cases

Alvarez v. Coleman, 642 So.2d 361 (Miss. 1994)……...24,25

Avakian v. Citibank, N.A., 773 F.3d 647 (5th Cir. 2014)……26

Bird v. Stein, 204 F.2d 122 (5th Cir. 1953)……...17, 18

Bluewater Logistics, LLC v. Williford, 55 So.3d 148 (Miss. 2011)…….14

Clark v. Neese, 131 So.3d 556 (Miss. 2013)…….21

Cooke v. Adams, 183 So.2d 925 (Miss. 1966)……..16

Estate of Bodman v. Bodman, 674 So.2d 1245 (Miss. 1996)…….....17

Estate of Darby v. Stinson, 68 So.3d 702 (Miss. Ct. App. 2011)……...21

Jones v. Graphia, 95 So.3d 751 (Miss. Ct. App. 2012)……...15

Marcum v. Mississippi Valley Gas Co., Inc., 672 So.2d 730 (Miss. 1996)…….20

May v. Hunt, 404 So.2d 1373 (Miss. 1981)……19

Mississippi Employment Sec. Com'n v. Philadelphia Mun. Separate School Dist. Of Neshoba County, 437 So.2d 388 (Miss. 1983)…….20

Monroe v. Holleman, 185 So.2d 443 (Miss. 1966)……25, 26

Parker v. Parker, 929 So.2d 940 (Miss. Ct. App. 2005)…….14

PMZ Oil Co. v. Lucroy, 449 So.2d 201 (Miss. 1984)……..26

Shepherd v. Shepherd, 336 So.2d 497 (Miss. 1976) ……..15, 25

Taranto Amusement Co., Inc. v. Mitchell Assocs., Inc., 820 So.2d 726 (Miss. Ct. App. 2002)……..22

W. v. W., 131 Miss. 880, 95 So. 739 (1923)…….18

Weissinger v. Simpson, 861 So.2d 984 (Miss. 2003)……...14

Other Authorities

Mississippi Rules of Evidence 502……13

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

Issue one: Did the lower court err in ruling, as a matter of law, that the interest of Mr. Ehrhardt in the house did not go into trust as his Will provided but, instead, passed directly to Julia Ehrhardt?

Issue two: Did the lower court err in excluding evidence that Robert Ehrhardt and Julia Ehrhardt entered into mutual wills that had the effect of severing the joint tenancy in the house?

STATEMENT OF THE CASE

A. Nature of the Case

Kemper and Robert Ehrhardt (the "Ehrhardt brothers") are the sons of Robert D. Ehrhardt, deceased ("Mr. Ehrhardt"). They appeal from a denial of a claim they asserted against the Estate of Julia Donelson Ehrhardt, the second wife of Mr. Ehrhardt.

Specifically, the Ehrhardt brothers contend that upon the death of Julia Ehrhardt, they became entitled to 50% of the proceeds from the sale of the house previously owned by Mr. Ehrhardt and Julia Ehrhardt.

B. Course of Proceedings

On January 16, 2016, the Estate of Julia Donelson Ehrhardt was opened in the Chancery Court of Warren County, Mississippi. *See* Record page 2; Record Excerpts page 5 (hereinafter "R.__" and "R.Ex.__, respectively).

That same day, Letters Testamentary were issued to Co-Executors Helen Donelson and Gary T. Huffman. R.23.

On March 26, 2015, the Co-Executors filed a motion seeking approval of the Chancery Court to sell the house in question.

That same day, an Order was entered authorizing the Co-Executors to sell the house. R.93.

The house was sold on April 10, 2015. The sale generated net proceeds of $243,277. R.98.

On July 2, 2015, the Ehrhardt brothers filed their Notice of Claim. R.112. As will be discussed in greater detail below, pursuant to the terms of the Will of Mr. Ehrhardt, upon his death his 50% interest in the house went into trust for the benefit of Julia Ehrhardt. This would permit her to remain in the house until her death, at which time the house was to be sold, with 50% of the proceeds going to his sons

The Co-Executors Helen Donelson and Gary T. Huffman filed their Contest of Claim on July 13, 2015. R.140.

The Contest of Claim was set for hearing on October 12, 2015. On that day, the Court heard testimony of the witnesses and received certain documents into evidence. *See* Trial Transcript of October 12, 2015 (hereafter "T.__").

C. Disposition in the Lower Court

The Will of Mr. Ehrhardt clearly expressed his intent that his 50% interest in the house first go into trust for the benefit of Julia Ehrhardt, with the house to be sold upon her death so that his sons received 50% of the proceeds. R.120-121; R.Ex.016-017.

The Chancellor, however, held that upon the death of Mr. Ehrhardt, full title vested in Julia Ehrhardt because the deed into them provided for joint

tenancy with full rights of survivorship. R.191-192; R.Ex. 011-012.

The Chancellor also held that because the house was the homestead of Julia Ehrhardt, her signature would have been required to transfer any interest in the house into the trust. R.191-192; R.Ex. 011-012.

Final Judgment was entered on January 11, 2016. R.201; R.Ex.013. Appellants filed a timely Notice of Appeal. R.202.

D. Statement of the Facts

As stated, the Ehrhardt brothers are the sons of Mr. Ehrhardt and his first wife. After his first wife passed away, he married Julia Ehrhardt.

On September 2, 1988, Mr. Ehrhardt and Julia Ehrhardt purchased a home in Vicksburg. The conveyance to them was "as joint tenants with full rights of survivorship and not as tenants in common." *See* Defendants' Exhibit 1.

On April 27, 2000, Mr. Ehrhardt executed his Last Will and Testament. *See* Plaintiffs' Exhibit 2; R.Ex.014-019.

With respect to the furnishings and contents of the house, Mr. Ehrhardt's Will bequeathed:

a. All of those acquired after their marriage to Julia, and

b. All of those owned by him prior to marriage to Julia could be used by her during her life, and upon her death they were to go to his sons.

See Articles V and VIII of the Will.

With respect to his interest in the house, Article VI of Mr. Ehrhardt's Will created a trust and named his wife, Julia, as the trustee of that trust.

Specifically, Article VI of Mr. Ehrhardt's Will reads as follows:

> My interest in the marital home (land and improvements) is hereby given, devised and bequeathed to my wife, Julia Donelson Ehrhardt, in trust and as Trustee for her benefit upon the following terms and conditions:
>
> A: She may reside in that house as long as chooses (sic) without paying any rent and provided that she maintains the house, pays all ad valorem taxes, provides the insurance coverage and otherwise bears the expenses associated with the house.
>
> B: My interest in the house shall remain in trust for my said wife's benefit and in addition my said wife shall have the right to sell the house including my interest therein, and to reinvest my half of the net proceeds of the house in a new dwelling. The trust shall own the new dwelling in the same ratio that the proceeds of the trust used to purchase the new dwelling bear to the total purchase price of the new dwelling.
>
> C: At the death of my wife, the trust shall terminate and then the house or subsequent dwelling in which the trust has an interest shall be sold and my fifty (50%) percent of net proceeds from the sale of that house or dwelling shall then be delivered to my residuary beneficiaries equally and per stirpes.
>
> D: My wife, Julia Donelson Ehrhardt, as trustee, is given all powers necessary to accomplish the purposes of this trust, including but not limited to, all powers granted under the Mississippi Uniform Trustees' Powers Law.

As reflected in Article VIII of Mr. Ehrhardt's Will, the "residuary beneficiaries" referred to in Article VI are his two sons, the Ehrhardt brothers.

The first witness to testify at trial was attorney Bobby Ellis of Vicksburg. In response to a subpoena, he brought with him certain documents from his firm's file regarding estate work they had done for the Ehrhardts.

The file on Mr. Ehrhardt included handwritten notes that strongly suggest Mr. Ehrhardt and Julia Ehrhardt had mutual, or reciprocal, wills.

For example, the notes read:

- "Survivor can live in house as long as survivor lives in house & pays tax, ins & maintenance."
- "House in Trust for survivor."
- "At survivor's death, trust terminates w[ith] death of survivor & then house sold & proceeds divide 1/2 Bob's children and 1/2 to Julia's.

When Mr. Ellis was asked whether Julia Ehrhardt had signed a mutual or reciprocal will with Mr. Ehrhardt, there was an objection on the grounds of privilege. The lower court sustained the objection. (As discussed below in Issue two, this was error.

Prior to the death of Mr. Ehrhardt, there was a reading of his Will. The persons present were Mr. Ehrhardt, Julia Ehrhardt, Robert Ehrhardt, Jr., and his wife Bobbie Ehrhardt. T–22-024; 48-49.

Thus, Julia Ehrhardt understood, prior to the death of Mr. Ehrhardt, she was to hold his 50% interest in the house in trust during her lifetime. She offered no objection to this. T. 22-024; 48-49.

Mr. Ehrhardt passed away on September 7, 2007. Mr. Ehrhardt's Will was admitted to probate in the Chancery Court of Warren County, Mississippi, on October 1, 2007, in Case Number 2007-128PR.

On July 22, 2008, Mr. Ellis' firm represented Julia Ehrhardt in the execution of a new Will. T.15. That Will was the one admitted to probate, and it make no provision for the Ehrhardt brothers to receive the 50% as their father intended. R.11.

SUMMARY OF THE ARGUMENT

The clear intent of Mr. Ehrhardt, as expressed in his Will, was that his 50% interest in the house go into trust upon his death for the benefit of Julia Ehrhardt. Then, upon her death, the house would be sold, with 50% of the proceeds going to his sons, the Ehrhardt brothers.

Julia Ehrhardt was aware of this intent and of her proposed role as trustee upon the death of Mr. Ehrhardt. Prior to his death, his Will was read aloud to her, and she voiced no objection.

Upon his death, Julia Ehrhardt accepted the benefits of Mr. Ehrhardt's Will, but in short order she executed a new Will that purported to leave the house to her own heirs, to the exclusion of the Ehrhardt brothers.

The evidence warranted a finding that Julia Ehrhardt had, implicitly if not expressly, agreed to a termination of the joint tenancy in the house and to accept

her role as trustee upon the death of Mr. Ehrhardt.

Further, the evidence strongly suggested that Mr. Ehrhardt and Julia Ehrhardt had entered into mutual, or reciprocal, Wills. The evidence reflects an agreement and design on their part for each to leave their 50% interest in the house to the survivor in trust, with the house then being sold upon the death of the survivor, with 50% of the proceeds going to the Ehrhardt brothers and 50% of the proceeds going to Julia Ehrhardt's children by prior marriage.

The lower court erred in sustaining an objection on the grounds of attorney-client privilege to inquiries as to whether the same law firm that prepared Mr. Ehrhardt's Will had prepared a mutual will for Julia Ehrhardt.

No privilege applies to the identification and production of an executed Will. Further, even if the attorney-client privilege could apply, the exceptions in Rule 502(d)(2) of the Mississippi Rules of Evidence create exceptions to that privilege.

Evidence of mutual wills would have demonstrated the intent of both Mr. Ehrhardt and Julia Ehrhardt to sever the joint tenancy in the house. It would have resolved the lower court's concern that Mr. Ehrhardt was attempting to "unilaterally" terminate the joint tenancy. Finally, it would have also resolved the lower court's concern that Julia Ehrhardt's signature would have been necessary because this was homestead property.

ARGUMENT

A. Standard of Review

On appeal, the Court reviews a chancellor's legal conclusions *de novo*. *Bluewater Logistics, LLC v. Williford*, 55 So.3d 148, 155 (Miss. 2011).

With respect to findings of fact, the Court will not reverse a chancellor's findings unless they are manifestly or clearly erroneous or unless an erroneous legal standard was applied. *Parker v. Parker*, 929 So.2d 940, 943 (Miss. Ct. App. 2005).

B. Issues Presented on Appeal

Issue one: Did the lower court err in ruling, as a matter of law, that the interest of Mr. Ehrhardt in the house did not go into trust as his Will provided but, instead, passed directly to Julia Ehrhardt?

When interpreting a will, there are two guiding principles. "First, the intention of the testator is controlling. Second, the testator's intent must, if possible, be gathered from the entire will, giving due consideration and weight to every word in it." *Weissinger v. Simpson*, 861 So. 2d 984, 987 (Miss. 2003).

Mr. Ehrhardt's Will is clear on this point. He wanted Julia Ehrhardt to hold his 50% interest in the house in trust during her life. Thereafter, he wanted the house sold, with 50% of the net proceeds going to his sons.

At the same time, there is no dispute that title to the house originally

vested in Mr. Ehrhardt and his wife, Julia, as joint tenants with full rights of survivorship. That is what the deed on file in the land records says.

That is a common deed, particularly with respect to real property owned by husband and wife. It is sometimes called a "poor man's probate" because, when one of the owners passes away, full title to the property vests in the survivor outside of probate. *Jones v. Graphia*, 95 So.3d 751, 754 (Miss. Ct. App. 2012).

One way to change that relationship, of course, would be for the parties to re-convey the property to themselves with a different type of ownership, such as tenants in common.

Under Mississippi law, however, a new deed is not the only way in which a joint tenancy with right of survivorship can be terminated. It can also be terminated by conduct or agreement of the joint owners (express or implied).

A joint tenancy can be terminated by implication when the parties act in a manner inconsistent with it, such as by making a contract that is inconsistent with a joint tenancy. *Shepherd v. Shepherd*, 336 So.2d 497, 499 (Miss. 1976).

At the hearing, the Ehrhardt Brothers offered evidence of three events which they say operated to terminate the joint tenancy:

-*First,* Mr. Ehrhardt prepared a Will that clearly reflects <u>his</u> intent that his 50% ownership pass to Julia in trust and not fee simple.

-*Second*, prior to Mr. Ehrhardt's death, there was a reading of his Will at which Julia attended. As a result, Julia was informed that Mr. Ehrhardt wanted her to hold his 50% interest in trust for his sons. She voiced no objection to this at the reading.

-*Third*, knowing the terms of the Will, and knowing that she was supposed to act as trustee for Mr. Ehrhardt's 50% interest (rather than claim it in fee simple), Julia Ehrhardt accepted the other terms of the Will and took under it.

As to the first matter - - Mr. Ehrhardt's Will - - Mr. Ehrhardt clearly expressed his intention in his Will that his 50% interest be held in trust by Julia during her lifetime, then pass to his two sons. Clearly, then, Mr. Ehrhardt wanted to terminate the joint tenancy.

As to the second matter - - the reading of the Will and Julia's failure to object - - "[a]ny conduct of one party from which the other party may reasonably draw the inference of a promise is effective in law as such, and conduct of the parties is to be viewed as a reasonable man would view it to determine the existence or not of an implied in fact contract." *Cooke v. Adams,* 183 So. 2d 925, 927 (Miss. 1966), *citing* 17 C.J.S. Contracts § 4 at 561 (1963).

"A promise which is implied in fact is merely a tacit promise, one which is inferred in whole or in part from the expressions other than words by the promisor." *Id.*

Further, as a person designated to serve as a trustee, if Julia did object, she was obligated to say so. Where a trustee finds that he has a property or other interest which conflicts with that of the trust beneficiaries, he has a duty to refuse the trust, resign, or remove the conflicting personal interest. *Estate of Bodman v. Bodman*, 674 So. 2d 1245, 1248-49 (Miss. 1996).

Of particular significance is *Bird v. Stein*, 204 F.2d 122, 124 (5th Cir. 1953), a case arising in Mississippi. In that case, V.A. Stein and his wife, Sarah Stein, acquired title to a plantation by a deed in which it was stated that the land was conveyed to them "as joint-tenants and not tenants in common."

Subsequently, V. A. Stein executed a will in which he undertook to devise to his wife a life estate in all of his property, with the remainder in trust for his children and two grandchildren, naming his daughter Ethel and son Lawrence as co-trustees of the estate.

After V.A. Stein died, the lower court held as a matter of law that no trust existed under the will, since the property passed to Sarah Stein, as joint-tenant, upon the death of her husband.

The Fifth Circuit disagreed, holding:

> Furthermore, it is obvious that Sarah Stein accepted the will of her husband as being in force, and made no objection to its probation. *Even though the estate which she held under the original deed prior to her husband's death was a joint tenancy, by electing to take under the will, and acquiescing in that part which bequeathed a portion of the property to*

> *her son Lawrence, she impliedly released any interest she might have had as a joint-tenant.*

Bird, 204 F.2d at 122 (emphasis added).

Thus, Mr. Ehrhardt passed away knowing that (i) he had made provisions for Julia to hold his 50% interest in the house in trust and (ii) she had been informed of that and made no objection. This was sufficient to create a contract (implied) that severed the joint tenancy.

Further, once Mr. Ehrhardt passed away, Julia was estopped from thereafter objecting to the terms of the Will insofar as it established the trust.

In *W. v. W.*, 131 Miss. 880, 95 So. 739 (1923), the Mississippi Supreme Court held that a husband who administered the estate and took property devised to him under the will, must see that the other devisees get the property devised them.

"By these acts he is estopped to assert title to the land belonging to him devised by the will. Had he desired to keep his own property devised by this will, it was his duty to have renounced the will, and he should not have qualified as executor thereunder." *Id.; see also Bird,* 204 F.2d at 122*:*

> We are of the opinion that Lawrence Stein was acting as trustee of the estate as provided under the will. * * * He at no time formally repudiated the trust, and is estopped to deny its validity. As such fiduciary, he may not derive personal gain from the estate.

In addition, with respect to the Ehrhardt Brother's interest in the house *via* the trust, that interest vested immediately upon the death of Mr. Ehrhardt.

"[T]he law favors the vesting of estates at the earliest time possible, and whenever there is doubt as to whether an interest is vested or contingent, the court will construe it as vested." *May v. Hunt*, 404 So. 2d 1373, 1376 (Miss. 1981).

"Upon the testator's death the seven children received a present fixed right to the immediate enjoyment of the income from the trust; and a present fixed right to the future enjoyment of the corpus of the trust. Both rights vested immediately and were subject to no contingencies. During the interim between the testator's death and the time when the children may enjoy the corpus of the trust, the legal interest will, of course, be vested in the trustee." *May v. Hunt*, 404 So. 2d 1373, 1379 (Miss. 1981).

Notwithstanding the foregoing, in the lower court, the Co-Executors point to the statement in the Order closing Mr. Ehrhardt's estate that the trust provision was "inapplicable". *See* Defendant's Exhibit 5, p. 4.

There can be no dispute that the language appears in the Order. The only question is whether it operates, as a matter of law, to bar the Ehrhardt brothers' claim. It does not.

First, as to the defenses of *res judicata* and collateral estoppels raised by the Co-Executors, the four identities are not present. The "four identities" required

for both collateral estoppel and *res judicata* are (1) identity of the subject matter of the action, (2) identity of the cause of action, (3) identity of the parties to the cause of action, and (4) identity of the quality or character of a person against whom the claim is made. *Marcum v. Mississippi Valley Gas Co., Inc.,* 672 So. 2d 730, 733 (Miss. 1996).

This is an action to recover money, *i.e.,* a share of the proceeds from the sale of the house. The prior action was a simple estate proceeding. Further, at the time that Mr. Ehrhardt's estate was closed, no money was owed to the Ehrhardt brothers because Julia was still alive and, therefore, was under no obligation to sell the house. The Ehrhardt brothers' right to be paid money came into existence only after Julia passed away.[1]

Further, "the doctrine of collateral estoppel must never be seen as anything other than an unusual exception to the general rule that all fact questions should be litigated fully in each case." *Mississippi Employment Sec. Com'n v. Philadelphia Mun. Separate School Dist. of Neshoba County*, 437 So. 2d 388, 397 (Miss. 1983).

At no point in the prior estate proceeding was there litigation over the issue now presented - - *i.e.,* did Mr. Ehrhardt and Julia sever their joint tenancy by their actions and agreement. T.16-17.

[1] This fact also refutes the Co-Executors' defense of laches.

Further, the Order reflect that the Court simply signed off on what was submitted by the lawyer. No actual adjudication of any fact or legal conclusion occurred.

The doctrine of judicial estoppel does not apply, either. Judicial estoppel applies when a party takes a position that benefits him in the first action and, subsequently, changes his position in a second action. *Clark v. Neese*, 131 So. 3d 556, 560-61 (Miss. 2013).

Yet, in the estate proceeding, the statement that the trust provision was "inapplicable" certainly did not benefit the Ehrhardt brothers. Exactly the opposite.

Nor did the Ehrhardt brothers waive their right to share in the proceeds from the sale of the house after Julia passed away. As noted above, their interest vested immediately upon the death of Mr. Ehrhardt. A knowing waiver of more than $100,000 requires more that exists here.

"There is a general presumption against the finding of a waiver, and the party asserting the waiver bears a heavy burden of proof." *Estate of Darby v. Stinson*, 68 So. 3d 702, 707 (Miss. Ct. App. 2011) (*citing Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 577 (5th Cir. 1991).

"Under Mississippi law, a 'waiver' presupposes a full knowledge of a right existing, and an intentional surrender or relinquishment of that right. It

contemplates something done designedly or knowingly, which modifies or changes existing rights, or varies or changes the terms and conditions of a contract. It is the voluntary surrender of a right." *Id* (*quoting Taranto Amusement Co., Inc. v. Mitchell Assocs., Inc.*, 820 So. 2d 726, 729 (¶ 13) (Miss. Ct. App. 2002).

"To establish a waiver, there must be shown an act or omission on the part of the one charged with the waiver fairly evidencing an intention permanently to surrender the right alleged to have been waived." *Id.*

All of the foregoing, uncontradicted, evidence supports a finding that the joint tenancy was terminated by express or implicit agreement of Mr. Ehrhardt and Julia Ehrhardt. There is something more, however.

As discussed immediately below, there is evidence to support the conclusion that Mr. Ehrhardt and Julia Ehrhardt signed reciprocal wills, with each agreeing to leave their 50% interest in the house in trust for the benefit of the survivor. The lower court rejected the Ehrhardt brothers' effort to introduce evidence of such a mutual, or reciprocal, wills.

Evidence of such, however, would clearly demonstrate the intent not only of Mr. Ehrhardt, but of Julia Ehrhardt, to terminate the joint tenancy.

In this regard, the lower court ruled that Mr. Ehrhardt could not unilaterally terminate the joint tenancy. R. 192; R.sy.012. Evidence of the mutual wills would resolve the lower court's concern about unilateral termination.

Issue two: Did the lower court err in excluding evidence that Robert Ehrhardt and Julia Ehrhardt entered into mutual wills that had the effect of severing the joint tenancy in the house?

As noted above, during trial, counsel for the Ehrhardt brothers sought to elicit testimony from attorney Bobby Ellis as to whether Julia Ehrhardt had executed a mutual or reciprocal Will with Mr. Ehrhardt. T.8-11.

To this, counsel for the Co-Executors objected on the grounds of privilege. T.8-11. The lower court sustained the objection. T.11. This was error for two reasons.

First, the undersigned is aware of no law that makes the existence of an executed Will subject to an attorney-client privilege. Such a document would have been signed by witnesses, and the attorney-client privilege simply does not operate to bar the identification or production of such a document.

Second, if (as the handwritten notes strongly suggest) Mr. Ehrhardt and Julia Ehrhardt executed mutual wills and were represented by the same law firm, any communications relating to that representation would be subject to the exceptions in Mississippi Rule of Evidence 502(d)(2) (claimants through same deceased client) and 502(d)(5) (joint clients).

Because the lower court would not allow Mr. Ellis to even answer the

question as to whether such a Will existed, the Ehrhardt brothers cannot say with certainty what that Will states. But, the existence of the handwritten notes, coupled with the fact that Julia Ehrhardt went back to the same firm one year after Mr. Ehrhardt died to execute a new Will, strongly suggest that such exists.

If so, then under well-established Mississippi law, after the death of Mr. Ehrhardt, Julia Ehrhardt was barred from executing a new Will that devised property in a contrary manner.

In *Alvarez v. Coleman*, 642 So. 2d 361 (Miss. 1994), husband and wife Vernard and Dixie Droke owned 39.1 acres as "tenants by the entirety, with the right of survivorship and not as tenants in common." They then executed nearly identical wills and a trust agreement, which provided that a trust would hold their property (including the 39.1 acres) for their benefit. Then, upon their deaths, 50% of the property would go to Dixie's great grandchildren and 50% to a church.

Dixie died first. Then, Vernard executed a new Will leaving all the property to his five nieces.

The Supreme Court held that Vernard's original Will became irrevocable upon the death of Dixie.

> We find that Vernard's and Dixie's 1981 wills, taken together with the trust agreement, comprise a reciprocal or mutual will. We have long recognized such wills, noting that the terms "reciprocal will" "mutual will" and "joint will" are used interchangeably:

Alvarez at 370.

"Reciprocal wills' are those in which each of two or more testators makes a testamentary disposition in favor of the other or others, under a similar plan, either by executing separate wills or by all uniting in the same will, a will of the latter sort, or one both joint and reciprocal, being sometimes termed a 'double' will." *Alvarez* at 371.

In conclusion, the Supreme Court held "there was a contract to place all assets in a trust, to give the surviving spouse unlimited use and control over the assets, and to divide the residue of the estate (contained in the trust) at the survivor's death between Vernard's designee, the Church, and Dixie's designee, her great grandchildren. Vernard breached this contract by attempting to transfer the residue of the estate to his designee exclusively. Dixie's great grandchildren may maintain a third party claim on this contract theory." *Alvarez* at 373.

To the same effect is *Monroe v. Holleman*, 185 So. 2d 443 (Miss. 1966).

The identification and production of Julia Ehrhardt's mutual will would have established whether Julia agreed (expressly or impliedly) to a severing of the joint tenancy. *See Shepherd v. Shepherd, supra.*

It would also address the lower court's concerns that the house was homestead property and that Julia's signature was required to convey an interest

in the house into trust. That is because the two Wills can be construed together as a single document.

"Moreover, the will of two or more persons executed pursuant to an oral agreement or understanding, may, within itself, when considered and construed together, constitute a contract." *Monroe v. Holleman*, 185 So.2d 443, 448 (1966).

In *Avakian v. Citibank, N.A.*, 773 F.3d 647, 653 (5th Cir. 2014), the Fifth Circuit examined Mississippi homestead law in a case where spouses had signed two separate deeds of trust. Looking at Mississippi case law, the Fifth Circuit held that the two deeds of trust could be construed together as a single instrument.

Likewise, if Mr. Ehrhardt and Julia Ehrhardt executed mutual wills, such can be construed together, thus terminating the joint tenancy and satisfying the homestead laws.

Conclusion

"Equity regards as done that which ought to be done." *PMZ Oil Co. v. Lucroy*, 449 So. 2d 201, 208 (Miss. 1984).

What ought to be done here is allow the Ehrhardt brothers to receive exactly (no more, no less) what their father intended (and what Julia understood was intended) rather than allow Julia's heirs to receive an inequitable windfall.

Therefore, Appellants Kemper Ehrhardt and Robert Ehrhardt ask that this Court reverse the ruling of the lower court and render judgment in their favor for their 50% share of the net proceeds of the sale of the house, together with interest.

Alternatively, they request that this Court reverse and remand this action to the lower court with instructions to require production of the documents that reveal whether Julia Ehrhardt and Mr. Ehrhardt had mutual or reciprocal Wills and, if so, to determine whether they had the effect of terminating the joint tenancy in the house.

Respectfully submitted, this the 15th day of August, 2016.

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CERTIFICATE OF SERVICE

I, S. Craig Panter do hereby certify that I have this date served a true and correct copy of the above and foregoing by the court's electronic filing system to:

Kenneth B. Rector
P.O. Box 991
Vicksburg, MS 39181

and by U.S. Mail, postage prepaid, to

Honorable William Barnett
2248 Sheffield Drive
Jackson, MS 39211-5852

This the 15th day of August, 2016.

/s/ S. Craig Panter
S. Craig Panter